I. QUESTION PRESENT FOR REVIEW

Was the district court's finding that the prosecution failed to rebut a prima facie case of racial discrimination in jury selection clearly erroneous where as the prosecutor's had used his peremptory challenges exclusively to strike six black venirepersons, where the reasons given for striking some black venirepersons were weak, and where the prosecutor failed to articulate a racially neutral reason for the peremptory challenge to one black venireperson?

II. PARTIES TO THE APPEAL TO THE COURT OF APPEALS

William Howard Harrison was the habeas petitioner in the district court and the appellee in the Court of Appeals for the Third Circuit in Appeal Number 90-1185. Harrison was cross-appellant in Appeal Number 90-1220 which appeal was dismissed as moot due to the Court of Appeal's decision in Appeal Number 90-1175.

Appellants in the court below in Appeal Number 90-1175 (and cross-appellee's in Number 90-1220) were Joseph M. Ryan, Superintendent, State Correctional Institute at Dallas, Pennsylvania, the Attorney General of the State of Pennsylvania, (presently Ernest G. Preate, Jr.) and Ronald D. Castile, District Attorney, Philadelphia, Pennsylvania.

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V. REPORTED OPINION

The opinion of the Court of Appeals for the Third Circuit in support of its order dated July 25, 1990 affirming the district court's granting of the petition for writ of habeas corpus is reported at 909 F.2d 84. The opinion is set forth in the appendix prepared by petitioners at A-1 to A-18.

VI. STATEMENT OF JURISDICTION

This Court has jurisdiction to review the Court of Appeals' affirmance of the granting of the petition for writ of habeas corpus pursuant to 28 U.S.C. §1254(1).

VII. CONSTITUTIONAL PROVISION INVOLVED

The issue presented by the petition for writ of certiorari involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution:

No state shall...deny to any person within its jurisdiction the equal protection of the laws.

VII. COUNTER-STATEMENT OF THE CASE

A. Procedural History

On November 19, 1987 respondent, William Howard Harrison, filed a petition for writ of habeas corpus under 28 U.S.C. §2254 challenging his incarceration pursuant to concurrent sentences of 10 to 20 years and 5 to 10 years imposed in the Philadelphia County Court of Common Pleas. The sentences were imposed following Harrison's conviction along with two co-defendants on September 20, 1982 for a robbery and conspiracy which occurred on February 5, 1982. Harrison's direct appeal from the judgement of conviction and sentence to the Pennsylvania Superior Court (No. 1572 Philadelphia 1983) resulted in an affirmance of the conviction on May 16, 1986. Thereafter Harrison filed a petition for allowance of appeal to the Supreme Court of Pennsylvania (No. E.D. Allocatur Docket 1986). The petition was denied on December 29, 1986.

In the petition for a writ of habeas corpus Harrison, a black man, raised a claim that the prosecutor practiced racial discrimination in his exercise of peremptory challenges so as to exclude from the jury six black venirepersons. Following an evidentiary hearing on October 5, 1988 United States Magistrate Tullio Gene Leomporra issued a report with a recommendation that Harrison's petition be granted. The report and recommendation was subsequently approved and adopted by the district court. In sum the magistrate found a prima facie case of racial discrimination arising from the prosecutor's use of six of eight peremptory

challenges available to him to strike six black venirepersons. The magistrate found that petitioners, hereinafter the "Commonwealth", rebutted the prima facie case of discrimination as to five of the six black venirepersons, but that it failed to rebut the prima facie case of discrimination in the peremptory challenge to venireperson, Alice Wright. On the basis of that finding the district court granted the petition for the writ conditioned upon the re-trial of Harrison.

The Commonwealth's appeal from the order granting the petition for a writ of habeas corpus was docketed in the Court of Appeals for the Third Circuit as Appeal Number 90-1175. Harrison cross-appealed from the court's ruling as to two of the other five venirepersons in regard to whom the court found the prima facie case discrimination had been rebutted. The cross-appeal was docketed as Appeal Number 90-1220.

On July 25, 1990 the Court of Appeals for the Third Circuit affirmed the district court's grant of the petition for writ of habeas corpus for racial discrimination in the exercise of a peremptory challenge to venireperson Alice Wright (Appeal Number 90-1175). The court dismissed as moot Harrison's cross-appeal (Number 90-1220). In its opinion the Court of Appeals commented in connection with its holding that Appeal Number 90-1220 was moot, that Harrison had not demonstrated that the district court's order was clearly erroneous. See Appendix at A-3-4 (text and n.1). The Commonwealth did not seek reconsideration by the Court of Appeals. The petition for writ of certiorari presently before the Court was

filed on October 15, 1990. Respondent received copies of the petition via the mail on October 16, 1990.

B. Statement Of Facts

1. Summary of Record of Jury Selection

The jury selection process in the state court which gave rise to the petition for writ of habeas corpus proceeded in the following manner:

The trial court gave general instructions to the entire venire panel and then asked the prospective jurors various standard general questions preliminary to being questioned individually. Thereafter the names of twelve venirepersons were chosen randomly. The first twelve venirepersons were questioned solely by the trial court, the remainder were questioned by the attorneys for Harrison, his two co-defendants and the prosecutor. (After the first twelve were questioned by the court the attorneys were given the opportunity to ask non-repetitive questions. None of the attorneys asked any questions at that time.) The attorneys used their peremptory challenges in an alternating manner. The exercise of peremptory challenges was done in a manner that prevented the venire persons from knowing which side struck a particular venireperson. After the court excused those venirepersons who were not accepted, a number of venirepersons was called equal to the number who were not accepted in the previous group, and instructed to sit in the seats for whom jurors had not get been selected. Jury selection

continued to proceed in this manner until twelve jurors were selected. The court then proceeded with the selection of two alternate jurors by the same method. In total 31 persons were considered for jury service. The names of the venire persons in the order called and a summary of the information obtained from them are listed below. For convenience the names of the six black venire persons struck by the prosecutor are marked with an asterisk and the venirepersons selected to serve are noted by the designation "selected". Also, the listing number corresponds to the seat number to which each venire person was assigned.

FIRST CALL:

1. Doris J. Ament Age 51, widowed, high school graduate, employed, lives alone.

2. Rachel E. Livezey (selected): Age 42, married, college graduate (Wesleyan College), majored in education, employed (school teacher).

3. Charlene Fitzgerald: Age 25, married, high school graduate, housewife (three small children).

4. Richard A. Edwards*: Age 46, married, 11th grade education in South Carolina, employed as a (truck driver), but unemployed at time of jury selection due to an injury. This juror stated that his wife was the victim of an assault four years earlier. He also stated that his son, a security guard, was convicted of unlawful possession of a firearm.

5. Sammy Toney*: Age 56, marital status not stated, 10th grade education in South Carolina, construction worker but presently

unemployed ("laid-off"), lives alone.

6. Rita C. Gower (selected): Age 62, marital status not stated, 8th grade education, employed (manages a restaurant), lives with sister.

7. Thomas Thakadipparumpil (selected): Age 51, married, college graduate in mathematics (in India), employed (machine operator in a factory)

8. Alice Wright*: Age 70, marital status not stated, 7th grade education in Georgia, lives alone. This juror stated that her son-in-law was a retired police officer.

9. Clare E. Lisowski: This venire person was excused after extensive questioning due to a physical disability.

10. Ellen Craig (selected): Age 64, marital status not stated, 10 years education, retired, lives alone.

11. Naomi R. Neal: Age 56, unemployed, and lives with an elderly sister. Neal stated that her home had been burglarized on one occasion and Neal had been robbed of her pocketbook. This venireperson was excused after extensive questioning due to an illness.

12. Arlene T. Kraemer: Age 35, marital status not stated, one year of college (accounting), employed (keypunch operator), lives with sister and mother.

SECOND CALL:

1. Monica Bishop (selected): Age 23, married, high school graduate, employed (Social Security Administration). This juror stated that her husband had been arrested for assault two or three

years earlier, that he was placed on probation and that he was still on probation at the time of jury selection.

3. William E. Lloyd (selected): Age 67, married, 10th grade education, "semi-retired". This juror stated that his son had been arrested for driving while intoxicated.

4. Margaret L. Matkowski (selected): Age 57, marital status not stated, high school graduate (in Austria), lives alone.

5. Stanley Loque*: Age 35, married, 2 years of college (studied "liberal arts"), employed (Social Security Administration). This juror stated that he works in the same building as panel member Monica Bishop, and knew her "in passing".

8. Carl Verna, Jr. (selected): Age 23, marital status not stated, high school graduate, employed (factory work), lives with his mother.

9. Randall E. Slimak (selected): Age 27, marital status not stated, student (medical school).

11. Edward E. Lindsay: Age 52, married, 10th grade education, employed (forklift operator).

12. Patricia A. Cantz (selected): Age 23, marital status not stated, high school graduate, lives with parents, employed (secretary). She stated that a brother had been arrested for possession of marijuana seven years earlier.

THIRD CALL[1]

5. Rudolph Gray, Sr.*: Age not stated, married, education not

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[1] Beginning with this group until the end of jury selection the venire panel members were questioned by the attorneys.

stated, employed (machinist). This juror stated that he was arrested for "interfering" with an arrest by a police officer five years earlier but that the charges were dismissed.

11. Paul D. Baker Age 26, married, high school equivalency diploma, employed (truck driver).

FOURTH CALL:

5. Michael Stumpo: Age 28, single, employed (tax collector).

11. Violet M. Hudson (selected) Age not stated, married, employed (secretary). This venire person stated that she had two sons-in-law who were police officers.

FIFTH CALL:

5. Alma Nottingham*: Age not stated, widowed, employed (salesperson in a department store) lives with daughters and a grandchild. During questioning by counsel for Harrison's co-defendant as to whether she would be fair to the defendants and the Commonwealth she stated she "probably" could be fair and hoped to be fair. The attorney described her as being hesitant.

SIXTH CALL

5. Edward F. Moniot: Age 59, married, employed (food service). This juror stated that his son-in-law was a police officer assigned to a "stake-out" squad.

SEVENTH CALL

5. Larry Strauss (selected): Age not stated, married, employed (IRS computer operator).

EIGHTH CALL (Alternates)

13. Ronald F. Noel, Sr.: Age 31, married, employed (machinist).

14. Thomas W. Ashley

Age not stated, married, owner of company which makes packaging-material.

NINTH CALL (Alternates)

13. Alice Ponsi (selected): Age not stated, married, employed (clerical worker).

14. Louis A. Kosinski (selected): Age not stated, married, retired jeweler.

2. Summary of Evidence Presented at Evidentiary Hearing

Two witnesses testified at the evidentiary hearing: the former Assistant District Attorney who selected the jury in question, Charles J. Cunningham, and appellee, William Howard Harrison.

Cunningham testified that he had been employed as an Assistant District Attorney from 1973 to 1986. He had tried over 100 hundred jury trials prior to prosecuting Harrison in September 1982, and subsequently tried 100 more before leaving the District Attorney's office. Cunningham testified that his approach to jury selection was as follows: He would think ahead to his closing argument and would try to select jurors "that I will be able to make that presentation to successfully". He added that he tried to select "people who will agree (with one another) ... because I didn't want a hung jury". He also wanted people who would respond well to him "as opposed to responding well toward defense counsel and poorly toward (him)".

Cunningham further testified that he believes every juror has a "reporting factor", that is, a person or persons to whom the

juror would be expected to tell about his or her jury service. Therefore, he stated, in evaluating a juror he also evaluated the people to whom the juror would have to "report". As an example, he testified that it would be difficult for a juror who was related to someone who had been convicted of a crime to report to that person that he had "just convicted someone ... of a serious crime, and they're probably going to go to prison, just like you did".

Cunningham also stated that he viewed a good employment history as an indicator that the person had a "stable lifestyle", and was able to "get along with other people (and) less likely to be an oddball ...". Moreover, their education indicated "the way they think"; whether they thought in "concrete terms", or were "inquisitive".

In regard to the jury selection in the instant case, Cunningham testified that he could not recall the physical appearance of the venire panel members and could not recall the answers given by the prospective jurors during voir dire. However, during jury selection he had taken four pages of notes; the notes were subsequently admitted into evidence as exhibit R-2. In the notes Cunningham had written information he considered important, such as age, education and other characteristics.

The prosecutor testified as follows in regard to his peremptory challenges to the six black venirepersons:

a. Richard A. Edwards

Cunningham noted that he had written "OK" in his notes indicating he intended to accept Edwards. However, he also had

drawn an arrow pointed downward which indicated a later decision to strike Edwards. Upon reviewing a statement in the transcript of the voir dire by Edwards that his son had been arrested for carrying a .357 magnum Cunningham suggested that information caused him to reject Edwards. He added on cross-examination that he believed that Edward's account of the arrest - that his son was a security guard who was merely cashing a check - was not entirely plausible; he thought Edwards may have been trying to minimize the circumstances of the case.

b. Sammy Toney

Cunningham testified that he could not recall why he struck Mr. Toney. He testified that it "could have been as simple as he and Mr. Edwards sitting next to each other in the jury box. They're both 56 years old, they're both from South Carolina. If the two of them were getting along well, I would not keep Sammy Toney after I had stricken Richard Edwards ... but I don't recall if that was the case".

c. Alice Wright

Cunningham noted that he had written "OK" on his notes next to Wright's name. He did not know why he struck Ms. Wright. He had not written her age in his notes, but assumed she was an older woman since her son-in-law was a retired police officer. "That could have been a factor; I don't know."

d. Stanley Logue

Cunningham noted that in his notes he had drawn an arrow pointing downward indicating he did not want Mr. Logue on the jury.

He also had noted that Logue said he had studied "liberal arts" at Temple University. Cunningham had no independent recollection as to why he struck Logue but suggested it was because Logue had studied liberal arts. Cunningham felt that persons who majored in liberal arts were inclined to be too "inquisitive" and to "look for doubt".

e. Rudolph Gray, Sr.

Cunningham could not recall why he struck Mr. Gray. He had made a note about Gray's reference to interfering in an arrest. He suggested that was probably the reason he struck Gray.

j. Alma Nottingham

Cunningham testified that his notes only indicated that Ms. Nottingham was a widow, that she was a sales person and that her daughter drove a cab. Upon reading the transcript of the voir dire Cunningham suggested that the reason he struck Nottingham ~~was~~ because she seemed to be "tentative" about her ability to be a good juror. At the conclusion of direct examination Cunningham specifically denied any discriminatory intent in jury selection in the instant case or in any other jury trial.

On cross examination Cunningham was asked to state his understanding of the law in regard to discrimination in jury selection in 1982. He stated that it was his understanding at the time of Harrison's trial that it was lawful to discriminate against black venirepersons in the use of peremptory challenges, and that the law forbade only "systematic exclusion" of black persons from venirepanels.

In addition Cunningham was questioned briefly as to his reasons for not striking certain venirepersons - Monica Bishop, Patricia Cantz and William E. Lloyd - all of whom had indicated that someone in their families had been arrested or convicted of a crime. In regard to Ms. Bishop, Cunningham testified that he inferred that her husbands's case (which involved an assault and for which he was placed on probation) was probably a "neighborhood type of thing". Similarly he did not regard the prior arrests for drug possession and drunk driving by persons in Cantz's and Lloyd's families as particularly significant because in his opinion they were not serious offenses.

Following Cunningham's testimony respondent Harrison testified that to his recollection all Commonwealth witnesses in the state court prosecution were white persons. Also, all but one of the jurors was white. The one non-white person was "a man from India" (presumably Mr. Thomas Thakadipparumpil).

IX. REASONS FOR DENYING THE WRIT

THE DISTRICT COURT ORDER GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS WAS BASED UPON A FINDING THAT THE PROSECUTION UTTERLY FAILED TO REBUT THE PRIMA FACIE CASE OF RACIAL DISCRIMINATION AS TO VENIREPERSON, ALICE WRIGHT. IN ITS AFFIRMANCE OF THE DISTRICT COURT ORDER, THE COURT OF APPEALS MERELY EFFECTED A STRAIGHT FORWARD APPLICATION OF THE PRINCIPLES ENUNCIATED BY THIS COURT IN BATSON V. KENTUCKY, TO THE DISTRICT COURT'S FINDING. CONTRARY TO PETITIONER'S ASSERTIONS, THE GRANT OF HABEAS PETITION WAS NOT AFFIRMED DUE TO THE PROSECUTOR'S INABILITY TO RECALL WHY HE PEREMPTORILY CHALLENGED WRIGHT - IN FACT, HE COULD NOT RECALL WHY HE STRUCK AT LEAST TWO OTHER BLACK VENIREPERSONS - BUT BECAUSE HE COULD NOT ARTICULATE A RACE NEUTRAL REASON FROM THE RECORD, AND BECAUSE THE RECORD REVEALED THAT HE HAD USED HIS PEREMPTORY CHALLENGES EXCLUSIVELY AGAINST BLACK VENIREPERSONS, AND BECAUSE THE REASONS ADVANCED FOR AT LEAST TWO PEREMPTORY CHALLENGE WERE WEAK.

A. APPLICATION OF BATSON TO THE RECORD

Purposeful racial discrimination against black persons by prosecutors in the exercise of peremptory challenges violates a black defendant's right to equal protection, as well as the right of black citizens in general to equal protection in regard to acceptance for jury services. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 1717-18 (1986). It also calls in to question the fairness of judicial proceedings. Id. at 1718.

As stated succinctly by the Court of Appeal for the Eleventh Circuit in United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986):

> Batson rests on a rationale that blacks are

> entitled not to be struck for racial reasons, and black defendants are entitled to be tried in a system free of racially exclusionary practices. This represents more than a group entitlement not to be entirely excluded from participation. Rather, under Batson, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for striking of some black jurors are shown.

In Batson this Court noted that its opinion in Swain v. Alabama, 300 U.S. 200, 85 S.Ct. 824 (1965) had been interpreted in such a way as to place on defendants a "crippling burden of proof' of violation of equal protection principles. Therefore, the Court propounded a more effective procedure for discovery of racial discrimination in jury selection:

Initially, a defendant must establish a prima facie showing that a prosecutor deliberately discriminated on racial grounds in the exercise of peremptory challenges. To do so the defendant must first show that he is a member of a cognizable racial group. Secondly, he is entitled to rely on the fact that the process of exercising peremptory challenges allows those inclined to discriminate on racial grounds to do so. Finally, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of their race." Supra at 1723. Once a prima facie case has been established, the burden shifts to the prosecutor to attempt to rebut the prima facie case of discrimination. To do so the prosecutor "must articulate a neutral explanation related to the particular case to be tried."

Id. Moreover, the Court held, the prosecutor's reason for exercising the peremptory challenge to strike black venire persons must be "legitimate" and the explanation of the legitimate reason must be "clear and reasonably specific". Supra at 1823, n.20.

It is readily conceded that it is likely that a prosecutor would forget his reasons for exercising peremptory challenges where as here he was not questioned about them until several years later due to the excessive delay in the state appellate court's disposal of Harrison's appeal. But in such cases the question is simply, who bears the burden of a prosecutor's lack of recollection - the government or the defendant? The answer has to be the former for several reasons.

First, Batson's directive is clear - unless the prima facie case is rebutted purposeful discrimination should be considered to have occurred. After all, by definition, the fact that a prima facie case of discrimination exists means that it appears on the face of matters that discrimination did occur. Second, a mere statement by a prosecutor that he does not remember why he exercised peremptory challenges - however plausible - cannot as a matter of policy be acceptable. The risk of abuse is too great. Obviously, a prosecutor who would purposely violate the law and engage in racial discrimination in jury selection is not likely to have much compunction about denying it or saying that he cannot remember. Third, it is not a harsh rule to require the prosecution rather than a defendant bear the burden of a prosecutor's lack of recollection for a peremptory challenge, no matter how plausible

the reasons for it. It is a necessary rule as a matter of policy given the overriding purpose of the Court's holding in Batson - to remedy as best possible the exercise of racial discrimination by government officials in an area of governmental authority where discrimination is especially intolerable, that is, in the administration of justice.[2] The prosecutor's inability to remember why a venireperson was struck need not leave the prosecutor empty handed and without a recourse in instances where a prima facie case of discrimination has been found. If there are other circumstances apparent in the record or presented at an evidentiary hearing which is sufficient to rebut the prima facie case that a prosecutor intended to discriminate in the exercise of peremptory challenges, then the claim of unlawful discrimination should fail. Other circumstances or other areas of inquiry or investigation which can shed light on a prosecutor's intentions are whether or not the peremptory challenge was isolated or appeared to be part of a pattern, or whether a purported reconstruction of events suggest reasons for peremptory challenges to black venirepersons which are not consistent with the prosecutor's treatment of other prospective jurors or simply reasons which are not entirely plausible.

Here the record is plainly sufficient to establish a prima facie case[3], the prosecutor could not recall the reason for

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[2] As noted by this Court in Batson discrimination in jury selection harms public confidence in the judicial system and is a stimulant to discrimination in general. Supra at 1718.

[3] See magistrates's report, App. at C-20-24.

striking the prospective juror, Alice Wright, and most importantly there is nothing in the record of the voir dire to rebut the prima facie case of discrimination. At the evidentiary hearing the prosecutor suggested that her age may have been a factor, but he had not even noted her age in his handwritten notes despite his stated practice of noting important characteristics. Moreover, the record establishes that the prosecutor did not strike several jurors who were close in age to Wright. See supra at 11-12 (Venire persons Rita C. Gower, age 62; Ellen Craig, age 64; and William E. Lloyd, age 67). Of course, older persons can vary a great deal in their appearance and level of energy, but there is no basis to speculate that Wright seemed significantly older than the other jurors. Nor is there reason to believe that her age would have been a basis for striking her even if she seemed "older" and less energetic than the other jurors. There was nothing about the case that gives rise to an inference that older jurors would not be desirable from the Commonwealth's point of view.[4] In addition, Wright stated that her son-in-law was a retired police officer. By the prosecutor's theory of jury selection - that it was necessary to consider to whom a prospective juror would have to "report" his or her verdict - Wright was an ideal juror.

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[4] Compare United States v. Clemons, 843 F.2d 741, 748, (3d. Cir. 1988) - use of peremptory challenges to strike young persons in narcotics prosecution held to be "logical".

B. THE SIGNIFICANCE OF THE "OK" NOTATION

One slender bit of evidence which the Commonwealth claims tends to rebut the prima facie case of discrimination - the fact that the prosecutor wrote "OK" next to Wright's name indicating an initial intention to accept her - upon analysis actually seems to indicate a predisposition to discriminate against black venirepersons.[5]

It hardly seems likely that the prosecutor intended "OK" to signify his intention to accept prospective jurors, but just forgot to make that notation for nearly all jurors in this particular case. Rather, it may be inferred from the prosecutor's use of the "OK" notation in regard to two black venirepersons that "OK" indicated a predisposition on the part of the prosecutor not to accept black jurors, absent something he considered to be a positive characteristic to overcome his predisposition. As the record shows, Alice Wright and Richard A. Edwards did have characteristics which made them desirable jurors from the prosecution's point of view. (See supra at 17-18, 27) Thus, it appears that as to all six black venirepersons peremptorily challenged by the prosecutor, only Edwards and Wright were seriously considered

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[5] The record establishes that Cunningham used the notation "OK" three times. The record also discloses that the notation was applied to two black venirepersons in the first group of twelve panel members - Richard A. Edwards, and Alice Wright. However, the record does not reveal the race of the third person to whom the notation was applied, Naomi Neal. (The significance of the lack of record as to Ms Neal's race is discussed below.)

for acceptance by the prosecutor.[6]

It is unfortunate that the record does not indicate Neal's race since it would shed light on the prosecutor's intention in writing "OK" only next to certain venire persons.[7] Venireperson Naomi Neal like Edwards and Wright had characteristics which made her desirable from the prosecution's point of view. She had twice been the victim of crimes - one burglary and one robbery. Since

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[6] At the conclusion of his testimony on direct examination the prosecutor suggested that the fact that he took notes as to the information provided by black jurors supported his contention that he had no intention to discriminate, because if he did have such an intention "I wouldn't have taken these notes..." The Commonwealth made a similar argument to the Court of Appeals.

However, the foregoing argument has no merit because it presupposes that a discriminatory intention must necessarily be all or nothing. Clearly a prosecutor who is strongly inclined to discriminate in jury selection against black persons will not necessarily strike every black person. Any given white venire person may have characteristics which are so undesirable from the prosecutor's point of view as to lead him to accept a black venire person despite his discriminatory predisposition rather than the particular white venireperson. (In fact, discrimination in employment practices usually entail precisely that kind of discrimination, not outright "no blacks wanted" discrimination.)

[7] The fact that the record does not disclose the race of Ms. Neal may be attributable to an ill-founded objection by the prosecutor during jury selection. After defense counsel objected to the prosecutor's use of peremptory challenges to black venire persons the trial court stated in response that "under the present status of the law that is not a basis... for sustaining your position". However, the court suggested to defense counsel that "(p)erhaps you'd better indicate who those people were. Let's go down the list. Juror Number Six ..." At that point the prosecutor interjected "... If (defense counsel) had not stated a cause for which relief can be granted, why are we doing this?" The court simply answered, "All right" and resumed jury selection. Therefore the race of the venire persons called beginning with the very first one, Number 006, Doris Ament were not disclosed at that time. Of course it is not certain that Ms. Neal's race would have been stated for the record but it may have been.

she lived with and cared for an elder sister the latter presumably was as much a victim of the burglary as was Ms. Neal herself. Therefore the person to whom Neal - in the prosecutor's parlance - she would be expected to "report" was, like Neal, a crime victim. Yet as has been noted Neal was excused due to her high blood pressure without objection by the prosecution or defense. If Ms. Neal was white that fact would weaken the inference that the "OK" notation reflected a predisposition to discriminate against black venirepersons. On the other hand, if Ms. Neal was black, application of the notation exclusively to three black venirepersons would necessitate the inference that it was indicative of a predisposition to discriminate. As it is now all we know of Ms. Neal's personal characteristics is that she was fifty-six years old, that she had moved to Philadelphia from Florence, South Carolina some time after attending high school there, and that she suffered from high blood pressure.[8]

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[8] The Commonwealth has attached great significance to the magistrate's comment regarding the prosecutor's use of "Ok". Also, in its brief to the Court of Appeals the Commonwealth suggested that Harrison failed to question the prosecutor's use of the "OK" notation in a timely manner to permit the prosecutor to respond to Harrison's argument that it reflected a predisposition to discriminate. First, the only statements made by Cunningham regarding his use of the "OK" notation were to the effect that it indicated that he had decided to accept Edwards and Wright. He did not mention Naomi Neal and he did not explain why he used that notation for Edwards and Wright. Therefore the only testimony by the prosecutor regarding the "OK" that the magistrate could credit was the aforementioned testimony - period. The statement in the magistrate's report that the "OK" dissipated the inference of discrimination is itself simply an inference - an interpretation of the meaning of a piece of evidence which the Court of Appeals was free to accept or reject (as it gives rise to a mixed question of law and fact).

C. The Prosecutor's Weak Reasons For Striking Two Other Black Venirepersons

Harrison argued to the Court of Appeals that the district court's finding that the prima facie case of discrimination as to venirepersons Sammy Toney and Stanley Logue was clearly erroneous. As noted supra the Court of Appeals held that Harrison's cross-appeal raising this claim was mooted by its disposition of the Commonwealth's appeal. However, the Court did note that the

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The Commonwealth's complaint that Harrison's argument was advanced untimely implies that its present interpretation of the significance of the "OK" notation did not originate with the magistrate but has been a staple all along of its attempt to rebut the prima facie case of discrimination. But as noted above the only reference to the "OK" notation at the evidentiary hearing was the prosecutor's statement that he used it to indicate his initial decision to accept Edwards and Wright. No explanation for his use of the notation for those persons, but not for others was elicited by the Commonwealth.

It is correct that Harrison made no reference to the "OK" notation in his brief to the magistrate after the evidentiary hearing. But his brief was the first due and no special significance had as yet been attributed to the notation. In fact no specific reference was made by the Commonwealth to the "OK" notation in its brief to the magistrate or in its memorandum in support of its statement of objections to the magistrate's report. Rather, the Commonwealth simply noted that the prosecutor testified that based upon his review of the handwritten notes he had initially decided to accept Edwards and Wright but in each instance was led to change his mind.

Therefore, since the first specific reference to the "OK" notation by the Commonwealth was in its initial brief to the Court of Appeals it is hardly unreasonable that Harrison's refutation of the Commonwealth's argument should also have first "surfaced" in its brief to this Court. (Moreover Harrison had no reason at the district court level even to respond to the magistrate's reference to the "OK" notation because the magistrate recommended granting the habeas petition due to discrimination as to Alice Wright, and Harrison was not objecting to the finding that the prima facie case of discrimination had been rebutted as to Edwards.) This claim is demonstrably baseless and misleading.

prosecutor's reasons for striking some other venire persons was "weak". Undoubtedly the Court had in mind the prosecutor's explanation for striking Toney and Logue at the very least.

The Record Regarding venireman Sammy Toney: As was the case with Alice Wright the prosecutor could not recall or reconstruct from his note why he used a peremptory challenge against Toney. However, over objection he was permitted to tender a purely conjectured explanation, to wit: that "it could have been as simple as (the fact that) he and Richard Edwards, (whom Cunningham had stricken) were sitting next to each other in the jury box (in seats four and five respectively). They were both 56 ... (and) from South Carolina.[9] If the two of them were getting along well, I could not keep Sammy Toney after I had stricken Richard Edwards ... but I don't recall if that was the case."

In other words, as was the case with Alice Wright, Cunningham did not give an explanation for the peremptory challenge to Toney. He did not recall why he struck him, and he could not reconstruct one from comments in his notes. Therefore, the magistrate's finding that Cunningham's peremptory challenge of Toney "was based solely on his intuition that Toney, who was sitting next to the stricken juror Edwards, was becoming friendly with Edwards because they were the same age and both from North Carolina (and because) Cunningham reasoned that Toney could hold a grudge against the

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[9] Cunningham's notes were mistaken in this record. The record of the voir dire shows that Edwards said he was 46 years old.

prosecutor for having stricken his friend, Edwards", was not supported by the record.[10]

Moreover, Cunningham's speculation as to what "may have been" the reason for the strike fails the test of rationality. First, no significance whatever can be attributed to the fact that Edwards and Toney sat together in the jury box. There was no evidence Edwards and Toney (who lived in different parts of the city) even knew each other, or knew of each other's backgrounds. They happened to sit together because their names or numbers happened by chance to be called in that order and they sat where they were directed to sit according to the order in which they were called. Moreover, there is no evidence whatever that they even talked with one another while in the jury box and presumably in the presence of the judge and the attorneys.[11] Nor was there any evidence that Toney knew or even could have known that Edwards was challenged by the prosecutor.[12]

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[10] In the report the Magistrate also stated "(i)t has been very difficult to determine whether or not the striking of Toney was racially motivated". But the magistrate concluded, "(w)hile I am not overwhelmed with the prosecutor's logic, there was little contradictory evidence to question the difficult standard that Batson requires". (App. at C-63).

[11] Compare United States v. Garrison, 849 F.2d 103 (4th Cir. 1988) (Peremptory challenge to two black women upheld because they chatted during voir dire, and seemed disdainful of the voir dire process.)

[12] In its petition (at 10, n.3) the Commonwealth asserted that "like venireperson's Edwards and Toney, whom the prosecutor also struck, Wright fit a profile of being from the South, not having completed her high school education and being unemployed at the time of trial." This comment is baseless. Cunningham never

In short, the record shows that the prosecutor had no recollection of the reason for striking Toney and his speculated reason in this instance was no more meaningful than his speculation that Alice Wright was struck due to her age.

The Record Regarding Stanley Logue: Cunningham did not recall why he struck Logue but thought it was likely that he did so because the 35 year old Logue had majored in "liberal arts" during his two years in college and Cunningham had highlighted "liberal arts" in his handwritten notes. Cunningham stated that in his opinion liberal arts students were inclined to be inquisitive and to look for doubt. Perhaps that explanation is plausible in an abstract sense. But the explanation must be evaluated to determine whether it is legitimate, or genuine and reasonably related to the case to be tried. In fact the questionable legitimacy of Cunningham's explanation becomes readily apparent upon comparing Cunningham's treatment of other prospective jurors. For one thing, Cunningham never inquired into the level of education or course of study of any other jurors who were not asked that information by the trial judge or defense attorneys. Thus there is no indication of any interest in the level of education or course of study of prospective jurors Gray, Stumpo, Hudson, Nottingham, Moniot, Strauss, Noel, Ashley, Ponsi and Kosinski.

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testified to a disinclination to accept as jurors persons who fit the above stated "profile". On the other hand, perhaps there was an operative profile the one additional aspect of which - not mentioned by the Commonwealth in note 3 - was that all three venirepersons were black.

In addition, Cunningham's claimed concern with inquisitive, doubting jurors is called in to question by his acceptance of a college graduate who majored in education and was employed as a teacher.[13] Logue on the other hand was 35 years old, and could have completed his two years of college study as many as fifteen years before jury selection. Moreover, although Cunningham claimed to want persons who would be able to agree with one another, he failed to accept Logue although he and another juror (Monica Bishop) worked in the same building and for the same government agency. In addition, Logue by all appearances was the kind of stable person Cunningham said he looked for in selecting jurors. In short, as was the case with Sammy Toney the record suggests Cunningham's explanation for his peremptory challenge to Stanley Logue was not genuine, but rather was an after-the-fact explanation.

D. The Magistrate's Supposed Fact-Finding That The Prosecutor Had No Discriminatory Intent.

The Commonwealth argues in its petition that magistrate (and district court) made an express fact finding that the prosecutor's "peremptory strike of venireperson Wright was not motivated by racial bias and that he did not discriminate in jury selection."

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[13] It is conceded that Cunningham's acceptance of juror Ronald Slimak who was a third year medical student does not serve as a basis for comparison since the juror provided a strong incentive to the prosecutor to accept him, namely his friendship with an Assistant District Attorney and a police officer.

Specifically, it points to the magistrate's statement: "We also have no reason to conclude that (the prosecutor) exercised purposeful discrimination or that his motives and creditability [sic] are suspect." (Petition at 11-12. See also Petition at 20-21, n.9.) However, a detailed review of the Magistrate's Report and Recommendation undercuts the Commonwealth's claim.[14]

The magistrate's report begins with a preliminary review of the evidence presented at Harrison's trial, and a review of law establishing the applicability of Batson to the instant case. (App. at C-1-20). Next the report states the basis for a finding of prima facie case of discrimination. (App. at C-20-24). The magistrate's report then sets forth the "facts established during the evidentiary hearing". App. at C-26. Nowhere in that section of the report is there a finding that the prosecutor did not have the intention of practicing racial discrimination in jury selection. See generally App. at C-25-35. At the beginning of the final (and longest) section of the report which is entitled "Discussion of Law" the Supreme Court's holding in Batson is

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[14] In its petition (at 12-13) the Commonwealth noted that the district court approved and adopted the magistrate's report and recommendation. It then stated: "Specifically, the District Court adopted both the magistrate's finding that racial bias was not a reason for the prosecutor's strike of venireperson Wright, as well as the conclusion that Batson nonetheless compelled relief because the prosecutor 'failed to articulate a neutral reason for challenging one of the six jurors' Appendix B, B-3."

In fact, the first half of the latter (quoted) statement is not correct. The district court did not "specifically" adopted the magistrate's "finding that racial bias was not a reason" for the peremptory challenge.

reviewed again as are several federal cases which discuss Batson. Toward the end of this beginning part of the section entitled "Discussion of Law" it is stated "(o)ther than a review of these cases, and the words of Batson itself, we are given no other guidelines to determine whether D.A. Cunningham's proffered reasons rise to the level required by Batson. We also have no reason to conclude that (the prosecutor) exercised purposeful discrimination or that his motives and credibility are suspect." App. at C-38-40.

The report then reviews the reasons given by the prosecutor for the six peremptory challenges in question. App. at C 40-46. After a detailed review of the reasons proffered by the prosecutor as to each venire person the report notes that the court's analysis "must go deeper than simply examining the reasons Cunningham proffered for striking the six black venire persons" such as consideration of the prosecutor's "questions and statements during voir dire", the "prosecutor's use of the voir dire process to determine whether his concerns with the venire persons were real", and whether the characteristics which prompted the peremptory strikes are similar to those characteristics of the empaneled jurors". (Citations omitted.) App. at C-46. From that point on to its conclusion, the report consists of an analysis of the aforementioned considerations in connection with the reason for the strikes suggested by Cunningham. In this section the venirepersons are not reviewed in the order in which they were called and in which they were previously discussed, but instead in the following order: Edwards, Gray, Logue, Nottingham, Toney and Wright. The latter two

are distinguished from the first four, according to the report, on the basis that the prosecutor "could not remember clearly why he (struck) Toney or Wright ... (but) had been able to recall why he struck the other four jurors." (App. at C-66).

In regard to Alice Wright and Cunningham's suggestion that he may have stricken Wright because of her agent the magistrate observed:

> The reason I must reject this explanation is not because of age but because the prosecutor could not recall his reason. The testimony which I credit is summarized by his repeated statement "I don't know." Since this is not a satisfactory statement under Batson, I conclude the evidence is not acceptable and the Commonwealth has failed to meet the standard.
>
> I do not believe that D.A. Cunningham utilized his peremptory challenges in a discriminatory manner, but only that he failed to satisfy the Batson test. ... (App. at C-67-68).

The foregoing has been construed by the Commonwealth as a statement that because the prosecutor could not recall why he struck Wright (as opposed to reconstruct why he struck her), he must be regarded as having failed to rebut the prima facie case of discrimination. But that is not precisely what the magistrate said. Also, such a reading of the magistrate's comment attributes totally contradictory findings to the magistrate since he had already observed that the prosecutor could not recall his reasons for striking Toney as well as Wright.

The reason the magistrate found that the prosecutor failed to rebut the prima facie case was literally because the prosecutor had said "I don't know". That is he could not recall why he struck her

and could not reconstruct a satisfactory explanation from his notes or from the record of voir dire.

In light of this, and in light of the structure of the magistrate's report the statement in the beginning of the "Discussion of Law" section of the magistrate's report that "(w)e ... have no reason to conclude that D.A. Cunningham exercised purposeful discrimination or that his motives and creditability are suspect" (App. at C-40) must be viewed as a statement of a presumption rather than a finding of fact. After all, it was precisely because there was a prima facie case of discrimination that a hearing was required. In that sense the prosecutor's motives were very much suspect. Also, the statement is out of place as a fact finding because it appears in a context in which the magistrate was purporting to undertake an analysis of the reasons for the peremptory challenges, not stating his findings or conclusions.[15]

As noted above, at the conclusion of the report in the context of observing that the prosecutor said he did not know why he struck venire person Wright, the magistrate stated "I do not believe that D.A. Cunningham utilized his peremptory challenges in a discriminatory manner, but only that he failed to satisfy the Batson test". (App. at C-67). In comparison to the foregoing statement this statement certainly reads as a straight-forward factual finding.

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[15] If in fact the foregoing was a statement of a presumption that the prosecutor would not have been inclined to discriminate it was improper. See United States v. Wilson, 853 F.2d 606, 609 (8th Cir. 1988). (Presumption that prosecutor would not have exercised peremptory challenges unlawfully was improper. "Under Batson, the Government is entitled to no such presumption.")

Yet in context it also seems to be something less - a mere observation, or a in effect a statement that the presumption accorded to Cunningham earlier - that his motives were not suspect - was still in force.

In any case this Court observed in Batson that mere assertion of good faith, non-discriminatory intention on the part of or behalf of a prosecutor are not sufficient to rebut a prima facie case of discrimination. Supra, 106 S.Ct. 1721, 1723:

> "If (denials of discriminatory motives and assertions of good faith) were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement' (Citation omitted) The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. (Foot note omitted). The trial court then will have the duty to determine if the defendant has established purposeful discrimination. Supra at 1723-1724.[16]

Consequently, even if the magistrate's comment to the effect that the prosecutor's motives were non-discriminatory, such a "finding" is immaterial because it is insufficient to overcome the prima facie case of discrimination.

E. The Supposed Conflict Between the Circuits

In its petition the Commonwealth asserts that the Third Circuit's decision in the instant case is in conflict with "rulings of the United States Courts of Appeals for the Eighth and Fourth Circuit". (Petition at 20). Specially, petitioner's assert that

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[16] In a footnote (21) the Court observed: "'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court." (Citation omitted.)

the latter Circuits "have expressly recognized that in pre-Batson case such as this, the prosecutor's inability to remember his precise non-racial reason for striking each potential juror does not logically give rise to an inference of discrimination and is not fatal to his ability to satisfy the prosecution's burden under Batson." (Petition at 23-24). And in a footnote (10) petitioner's accuse the Court of Appeals for the Third Circuit of having "failed to even address, much less distinguish the reasoning" in the Eight and Fourth Circuit case.

However, a review of the cases cited by the Commonwealth reveals them to be so readily distinguishable as to not have necessitated discussion by the Third Circuit in its opinion in the instant case however desirable such discussion might have been.

In United States v. Nicholson, 885 F.2d 481 (8th Cir. 1989), the prosecutor used three of six peremptory challenges to strike black venire members. Since Batson was decided while the case was on direct appeal the Court of Appeal remanded the case to the district for an evidentiary hearing. The district court found that a prima facie case of discrimination had been established, but also found - contrary to the present case - that "the government had articulated a neutral explanation for its peremptory challenges..." Supra at 482. Although the prosecutor could not locate his notes made at the time of jury selection and could not recall the specific reasons he peremptorily challenged the three black venire persons, he could - and did - reconstruct the reasons from the record. Specifically, the prosecutor testified to his general

criteria for jury selection - a preference for older, married, employed persons, and a disliking for those who have little to say during voir dire - and compared these criteria with the voir dire record and found that each black venireperson had at least one disqualifying characteristics.

In its opinion the Eighth Circuit cited with approval its prior decision in United States v. Wilson, 867 F.2d 486 (1989) which decision was also cited in the Commonwealth's petition. As in Nicholson, the prosecutor in Wilson could not recall his specific reason for striking black venireperson (in this case two woman) but noted that the strikes were consistent with his stated preference for male jurors in prosecutions for a "street crime". United States v. Wilson supra quoted in United States v. Nicholson, supra at 483. In Wilson the Court held that the prosecutor's explanation was "sufficiently specific under Batson inasmuch as it provided the District a basis upon which to conclude that the Government had not stricken there venireperson the assumption that they would not be partial to the defendant because of their shared race." Id. In Nicholson the Court applied the same reasoning to the prosecutor's testimony and accordingly found that the district court's decision was not "clearly erroneous".

Here the Court of Appeal suggested that if the question of racial discrimination against venireperson Toney and Logue were not moot it would have found that the district court's ruling in connection with them was not clearly erroneous - despite the prosecutor's inability to recall why he struck them. (See Appendix

A-4, n.1). In short, as was the case with the prosecutors in Nicholson and Wilson, the prosecutor in the present case was found to have successfully reconstructed a race neutral reason for the peremptory challenges to Toney and Logue (as well as to three other venirepersons). However here, paraphrasing the Eight Circuit's decision in Wilson, the prosecutor was not able to provide the district court a basis upon which to conclude that he had not stricken venireperson Wright on account of her shared race with Harrison. In other words, only if the Court of Appeals for the Third Circuit had held that the prosecutor's mere inability to recall the reasons for his peremptory challenges was grounds for finding discriminatory intent would the decision in the present case be inconsistent with Nicholson and Wilson. The Court did not so hold; thus there is no conflict.

The Commonwealth's attempt to demonstrate conflict with the Fourth Circuit as a result that court's decision in United States v. Harrell a/k/a Allen, 847 F.2d 138 (1988) is equally unsuccessful. In Harrell, the Court of Appeals was reviewing a district court ruling following an evidentiary hearing on the issue of discrimination in jury selection. (This Court had remanded the case to the Court of Appeals in light of Batson and the latter Court had ordered the evidentiary hearing.) In its per curiam opinion the Court of Appeals noted that the prosecution had stricken five black venire persons, and that the district court had found a prima facie case of discrimination but also that the court found the prosecutor had rebutted the prima facie case. The Court

then observed that the prosecutor testified to his criteria in jury selection - a preference for "educated" and employed venirepersons - and that "a review of the record shows that he was successful in his efforts". Lastly the Court referred with approval to the opinion of the district court, United States v. Allen, 666 F.Supp. 847 (E.D. Va. 1987). In the latter opinion it was noted that the prosecutor "admitted that he could neither recollect nor reconstruct the actual physical appearances of the jurors". Id. However, the prosecutor was able to explain the reasons for his peremptory strikes by reference to the criteria noted above. Moreover, the jurors who were selected did in fact affirmatively fit the prosecutor's stated preferences. (That is, each juror had a high school education or was employed on both.) In addition, the prosecutor was able to recall that he peremptorily struck two black woman for reasons having to do with their demeanor. He could recall his specific objection to one of the latter (that she was inattentive) but he could not recall his particular objection to the second - only that it had to do with her demeanor.[17]

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[17] The district court's opinion states with regard to the prosecutor's explanation of his challenge to the second black venirewoman: "... Mr. Krazenski testified that his handwritten "no" besides Barbara Smith's name meant, 'there was something I observed about her, some very specific observation which I cannot recall at this time. '... In reliance or Swain .... (footnote omitted) the prosecutor had no reason in May 1985 to think that he had to record or document the selection process." The "no" written by the prosecutor in Harrell seems (comparable to the downward pointing arrow used by the prosecutor in the present case in connection with venirepersons Edwards and Logue - that is, as a notation or symbol indicating definite disapproval for some reason, stated or unstated. But it certainly does not have the same import as the use of the notation "OK" by the prosecutor in connection with two

Lastly in Harrel the district court gave consideration to the "totality of circumstances" surrounding the prosecutor's use of peremptory challenges to five black venirepersons. Of curse, the Court of Appeals undertook precisely the same kind of analysis in the its opinion in the present case. The most significant circumstance was that the prosecutor did not challenge three black persons who were seated as jurors, and another who was seated as an alternate. In comparison, here the prosecutor used only six of eight peremptory challenges and used all six against black venire person, and no black person served on the jury.[18]

Two other decisions cited by the Commonwealth for the proposition that "failure to explain every peremptory strike is not necessarily fatal to prosecutor's ability to meet burden under Batson', hardly require discussion. The decisions in question are United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986) and United States v. Forbes, 816 F.2d 1006, 1011, n.7 (5th Cir. 1983). In Forbes the prosecutor peremptorily challenged three black venirepersons (one of who was a potential alternate). The prosecutor interpreted the defense objection as a demand that he explain only two of the three strickes, and therefore he did so. The

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black venireperson, and a third venireperson whose race is not a matter of record.

[18] Moreover, the Court of Appeals found that reasons for peremptory challenges to several venireperson in addition to Alice Wright was "weak". In a similar view, in regard to the peremptory challenge to Sammy Toney the magistrate stated: "While I am not overwhelmed with the prosecutor's logic then was little contradictory evidence..." (App. at C-63).

defense raised the issue of the lack of explanation as to the strike of the third venireperson for the first time on appeal. The Court of Appeals held the objection was untimely. In a footnote (7) the Court referred with approval to a statement in United States v. David, supra at 1571 which the Commonwealth quoted only in part - that "'(f)ailure... to explain every peremptory strike of black jurors is not necessarily fatal to the prosecutor's ability to rebut a prima facie case; likewise, explanation of most of the strikes on non-racial grounds does not necessarily "satisfy his burden". Quoted in United States v. Forbes, supra at 1011, no.7. (Emphasis added.) The foregoing admonition by the Court of Appeals for the 11th Circuit is precisely the kind of balanced approached which the Court of Appeals for the Third Circuit undertook in the present case.

X. CONCLUSION

For all of the foregoing reasons it is reasonable to characterize petitioner's attack on the Court of Appeals opinion as without merit. While not insignificant in its import, the Court's opinion is perfectly consistent with this Court's Decision in Batson v. Kentucky and is not in the least in conflict with decisions reached in other Circuits. Accordingly the petition for writ of certiorari should be denied.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Michael J. Kelly, Assistant Defender, hereby certify that I have served three copies of the attached Respondent's Brief In Opposition To Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit upon Gaele McLaughlin Barthold, Deputy District Attorney, Elizabeth Chambers, Chief Federal Litigation Unit and Kathy L. Echternach, Esquire, Assistant District Attorney, by mailing a copy to her office, 1421 Arch Street, Philadelphia, PA 19102, via first class mail, postage prepaid.

Michael Kelly

MICHAEL J. KELLY

DATE: 11-14-90